

State v. Thomas: The Final Blow to Battered Women?

I. INTRODUCTION

The Ohio Supreme Court recently faced the question whether expert testimony concerning "battered women's syndrome"¹ is admissible to support the claim of self-defense by a woman on trial for murder. Other courts have considered this issue, and their decisions indicate a general trend in favor of admitting this type of evidence.² In *State v. Thomas*³ the Ohio Supreme Court concluded that the trial judge had not committed reversible error by excluding the proffered expert testimony.⁴ Judge Clifford Brown, author of the court's opinion,⁵ waged a brief⁶ attack on the use of expert testimony concerning battered women, finding the evidence irrelevant, unnecessary, unsupported by accepted scientific knowledge, and more prejudicial than probative.⁷ This Case Comment examines the evidentiary issues raised by the use of expert testimony on the subject of battered women in light of both Ohio case law and the *Ohio Rules of Evidence*.⁸ It also examines the prospect of future use of expert testimony in similar cases.

II. BACKGROUND

A. The Facts of State v. Thomas

On January 12, 1978, Kathy Thomas killed Reuben Daniels, her common-law husband.⁹ Thomas shot Daniels once in the head and once in the left arm.¹⁰ He was slumped forward in a living room chair when the police ar-

1. For a discussion of "battered women's syndrome," see *infra* text accompanying notes 29-53. That this term is phrased in the feminine gender is not an indication that the same principles do not apply to battered men. This Case Comment, however, deals only with expert testimony on the subject of battered women.

2. Four courts held that the exclusion of this testimony constituted a reversible error: *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979) (remanded for a determination of the adequacy of the expert's methodologies; testimony again excluded and a subsequent appeal is pending); *Hawthorne v. State*, 408 So. 2d 801 (Fla. Dist. Ct. App. 1982); *Smith v. State*, 247 Ga. 612, 277 S.E.2d 678 (1981); *State v. Anaya*, 438 A.2d 892 (Me. 1981). In *State v. Baker*, 120 N.H. 773, 424 A.2d 171 (1980), expert testimony concerning battered women was held admissible to rebut the defendant husband's claim of insanity. Of the three cases that have found the proffered testimony inadmissible—*State v. Griffiths*, 101 Idaho 163, 610 P.2d 522 (1980); *People v. White*, 90 Ill. App. 3d 1067, 414 N.E.2d 196 (1980); and *Buhrle v. State*, 627 P.2d 1374 (Wyo. 1981)—none has flatly rejected the use of expert testimony. In all but the latter case, an effort was made to distinguish the proffered testimony from that proffered in the cases in which the testimony was held admissible.

3. 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981).

4. *Id.* at 520, 423 N.E.2d at 139.

5. Of the seven judges participating in the decision, only Judges W. Brown and Sweeney concurred in the opinion. Judge Holmes concurred in the syllabus and judgment, and Chief Judge Celebrezze and Judges P. Brown and Locher concurred only in the judgment. *Id.* at 522, 423 N.E.2d at 140.

6. The opinion is only three pages long.

7. 66 Ohio St. 2d 518, 521-22, 423 N.E.2d 137, 140 (1981).

8. Kathy Thomas' trial took place in June 1978, prior to the 1980 adoption of the *Ohio Rules of Evidence*. The effect of the rules will be examined. See *infra* text accompanying notes 67-69, 76-77, 93-94, 134, & 165-66.

9. 66 Ohio St. 2d 518, 518, 423 N.E.2d 137, 138 (1981).

10. *State v. Thomas*, 17 Ohio Op. 3d 397, 398 (Ct. App. 1980), *rev'd*, 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981).

rived.¹¹ According to Thomas' statements prior to the trial¹² and her testimony at trial, Daniels became upset and struck her. He pushed her from the kitchen into the living room and onto the couch. Daniels then moved away from the couch. Thomas picked up a gun, stood up, moved towards Daniels, and shot him twice. She then called the police.¹³ From defendant's statements and testimony it is unclear exactly where Daniels was when shot or why he was angry.¹⁴

The couple had lived together intermittently for two years.¹⁵ Thomas testified that she was beaten frequently throughout this period. She left Daniels on several occasions, but either had returned voluntarily or had been brought back by force.¹⁶

On February 13, 1978, Thomas was indicted for murder.¹⁷ At her trial witnesses testified that Daniels was violent, was a heroin addict, always carried a gun,¹⁸ and had killed at least five persons.¹⁹ Daniels' former girlfriend stated that during her four-year relationship with Daniels he had beaten her almost nightly.²⁰

Several witnesses frequently had seen bruises on Thomas' body.²¹ A physical examination conducted after the shooting revealed bruises and swelling around her eyes, which were determined to be two to three days old. There was no evidence of physical injuries received on the night of the shooting.²² During her trial the defendant called two expert witnesses to explain the concept of battered women's syndrome in order to support her self-defense claim.²³ After a *voir dire* examination of the witnesses, the judge concluded

11. *Id.* At Kathy Thomas' trial a pathologist from the coroner's office testified that the deceased was probably seated when shot. *Id.*

12. Two of these statements were made at the scene, and a third at the police station. *Id.* at 397.

13. *Id.* at 398-404.

14. In the defendant's first statement she indicated that Daniels sat down after pushing her onto the couch and that he was seated when she shot him. She stated that he had become upset when something burned in the oven. *Id.* at 399 (Lieutenant Lynch's testimony). In defendant's second statement she indicated that Daniels was about to sit down when he was shot. *Id.* at 398-99 (Patrolman Coy's testimony). At the police station the defendant told the police that Daniels was upset because he had found a pawn ticket in her belongings and had been sitting, but was in the midst of getting up when she shot him. *Id.* at 400 (Detective Ted Schaefer's testimony). At trial Thomas said that the fight began when Daniels found the pawn ticket, but escalated when the fish burned. She also stated that Daniels was on his feet when she shot him, and had fallen back into the chair. *Id.* at 401-02.

15. *Id.* at 398.

16. According to Thomas, after the first time she left Daniels, she returned when he promised he would change. Thomas and other witnesses testified that on other occasions she had been physically forced to return; in one instance, she was forced to do so at gun point. *Id.* at 400.

17. *Id.* at 397.

18. *Id.* at 399.

19. *Id.* at 400.

20. *Id.* at 403.

21. *Id.* at 399-402.

22. *Id.* at 400.

23. Gerald Buckley and Lynn Rosewater were the offered experts. The testimony of the latter was not considered by the court of appeals because of the defendant's failure to make a proper proffer of her intended testimony. *Id.* at 406. The court considered Buckley to be a qualified expert. His qualifications included: Studying and treating approximately 300 battered women; working as a psychiatric social worker for ten years, of which about one-fifth involved work with battered women; providing crisis counseling to battered women for eight years; acting as a referral source for the Battered Woman's Hotline; and counseling batterers for three years. He also had a master's degree in social work. *Id.* at 406.

that their testimony was inadmissible for two reasons: first, the subject was within the jury's understanding and therefore not proper for expert testimony; second, neither expert had conducted a personal interview with the defendant.²⁴ On June 20, 1978, the jury found Kathy Thomas guilty of murder.²⁵

In July 1980 the Cuyahoga County Court of Appeals reversed the trial court's judgment on the ground that the expert testimony of one of the defendant's witnesses was excluded erroneously, and it remanded the case for a new trial.²⁶ The Ohio Supreme Court reversed this decision on June 24, 1981.²⁷ Thomas' subsequent habeas corpus action was unsuccessful in U.S. District Court.²⁸

B. Battered Women's Syndrome

Dr. Lenore Walker, a licensed clinical psychologist,²⁹ was the first researcher to identify the syndrome common among battered women.³⁰ Having studied over 120 battering relationships, Walker identified the recurring characteristics of the victims, their abusers, and their relationships.³¹ From her findings she generated a profile of the battered woman, including her self-image and her perception of her relationship with her abuser.³² To suffer from the syndrome simply means that the woman fits the profile of the battered woman. Dr. Walker found that the typical battered woman has little self-esteem³³ and has traditional views about the importance of home, family,³⁴ and the roles of men and women.³⁵ Much of the research on the subject of battered women supports her findings.³⁶

Several of Dr. Walker's findings bear directly on the battered woman's perception of danger. Most women interviewed felt that their attackers had the ability to kill them,³⁷ but were "beyond the grasp of the law."³⁸ Also, battered women experience a "learned helplessness," which causes them to feel they can do nothing about their relationships with their abusers and which

24. *Id.* at 403.

25. *Id.*

26. *Id.* at 407.

27. *State v. Thomas*, 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981).

28. *Thomas v. Arn*, No. C81-1517A (N.D. Ohio Sept. 3, 1982). See also *Cleveland Plain Dealer*, July 29, 1981, at D4, col. 1; *Cleveland Press*, July 29, 1981, at A8, col. 1.

29. THE VICTIMIZATION OF WOMEN 281 (J. Chapman & M. Gates eds. 1978). For a discussion of Dr. Walker's experience in the field of psychology, see L. WALKER, *THE BATTERED WOMAN* xi-xvi (1979).

30. Comment, *The Battered Wife's Dilemma: To Kill or Be Killed*, 32 HASTINGS L.J. 895, 927 n.183 (1981).

31. L. WALKER, *supra* note 29, at xiii.

32. See generally L. WALKER, *supra* note 29.

33. *Id.* at 31. See also D. MARTIN, *BATTERED WIVES* 81-83 (1976).

34. L. WALKER, *supra* note 29, at 31. See also D. MARTIN, *BATTERED WIVES* 81 (1976).

35. L. WALKER, *supra* note 29, at 31.

36. See generally J. FLEMING, *STOPPING WIFE ABUSE* (1979); R. LANGLEY & R. LEVY, *WIFE BEATING: THE SILENT CRISIS* (1977); D. MARTIN, *BATTERED WIVES* (1976); E. PIZZEY, *SCREAM QUIETLY OR THE NEIGHBORS WILL HEAR* (1977); Martin, *Battered Women: Society's Problem*, in THE VICTIMIZATION OF WOMEN 111 (J. Chapman & M. Gates eds. 1978); Steinmetz, *Wife Beating: A Critique and Reformulation of Existing Theory*, 6 ACAD. PSYCHOLOGY & L. BULL. 322 (1978); N. JAFFE, *ASSAULTS ON WOMEN; RAPE AND WIFE BEATING* (Public Affairs Pamphlet No. 579, 1980).

37. L. WALKER, *supra* note 29, at 75.

38. *Id.* at 64.

ultimately changes their perception of the consequences of the violence directed at them.³⁹ Dr. Walker explains learned helplessness as follows:

Once we believe we cannot control what happens to us, it is difficult to believe we can ever influence it, even if later we experience a favorable outcome. This concept is important for understanding why battered women do not attempt to free themselves from a battering relationship. Once the women are operating from a belief of helplessness, the perception becomes reality and they become passive, submissive, "helpless." They allow things that appear to them to be out of their control actually to get out of their control.⁴⁰

After studying the interactions between abusers and their victims, Dr. Walker concluded that battering occurs in a definite cycle.⁴¹ There are three stages in the cycle: the tension-building phase; the explosion or actual battering event; and the calm, loving interval between battering incidents.⁴² During the tension-building phase low level physical or psychological abuse occurs.⁴³ Fearing escalation, women often attempt to restore equilibrium.⁴⁴ If the attempt to pacify the abuser fails, the tension eventually reaches a point when controls are ineffective.⁴⁵ During the close of the first phase women usually are unable to ascertain the type of harm that will occur;⁴⁶ this uncertainty causes severe psychological stress and anxiety.⁴⁷ The second stage of the cycle, the explosion, consists of an uncontrollable discharge of the tension accumulated during the first phase. Unlike the relatively minor abuse of the previous stage, the explosion is characterized by major destructiveness.⁴⁸ Following the explosion, a calm occurs.⁴⁹ The attacker will often seek forgiveness and promise to reform. This makes the woman's decision whether to take action more difficult.⁵⁰

Dr. Walker's findings exemplify the type of expert evidence available on

39. *Id.* at 45-54.

40. *Id.* at 47.

41. *Id.* at 55-70; Walker, *Treatment Alternatives for Battered Women*, in *THE VICTIMIZATION OF WOMEN* 143, 146-54 (J. Chapman & M. Gates eds. 1978).

42. L. WALKER, *supra* note 29, at 55.

43. *Id.* at 56. For example, the batterer may throw his dinner across the kitchen or verbally harass the victim. *Id.* at 57-58.

44. *Id.* at 57. "She usually attempts to calm the batterer through the use of techniques that have proved previously successful. She may become nurturing, compliant, and may anticipate his every whim; or she may stay out of his way." *Id.* at 56.

45. *Id.* at 59.

46. *Id.* at 60.

47. *Id.* at 61.

48. *Id.* at 59. Dr. Walker gives the following examples:

Major physical assaults included: slaps and punches to the face and head; kicking, stomping, and punching all over the body; choking to the point of consciousness loss; pushing and throwing across a room, down the stairs, or against objects; severe shaking; arms twisted or broken; burns from irons, cigarettes, and scalding liquids; injuries from thrown objects; forced shaving of pubic hair; forced violent sexual acts; stabbing and mutilation with a variety of objects, including knives and hatchets; and gunshot wounds.

Id. at 79.

49. *Id.* at 65.

50. As Walker notes, "Since almost all of the rewards of being married or coupled occur during phase three . . . , this is the time when it is most difficult for her to make a decision to end the relationship." *Id.* at 69.

the subject of battered women. She has been offered as an expert witness in at least three cases.⁵¹ The expert witness properly offered in *Thomas*, like Dr. Walker, had extensive experience with battered women.⁵² Had he been permitted to testify, he would have shared with the jury his own opinions regarding battering and its ramifications for the abused woman's state of mind—his concept of the battered woman and her relationship with her abuser.⁵³

III. THE EVIDENTIARY ISSUES

In *State v. Thomas*⁵⁴ the court provided little in-depth analysis of the evidentiary issues raised by the use of expert testimony on the subject of battered women.⁵⁵ In this section the four evidentiary issues noted by Judge Brown will be examined: whether the testimony is relevant; whether it is helpful; whether the state of the art is sufficient to allow an expert opinion to be formed; and whether the prejudicial impact of the testimony outweighs its probative value.

To examine these evidentiary issues, it is first necessary to understand the self-defense claim.⁵⁶ To establish a claim of self-defense in Ohio,⁵⁷ a defendant must show that he or she had a bona fide belief at the time of the killing that he or she was in imminent danger of death or great bodily harm.⁵⁸ Because the accused's state of mind is the crux of the defense,⁵⁹ the jury must consider the defendant's subjective fears and perceptions when

51. See *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979); *Hawthorne v. State*, 408 So. 2d 801 (Fla. Dist. Ct. App. 1982); *Buhrle v. State*, 627 P.2d 1374 (Wyo. 1981).

52. For a discussion of the defense expert's experience and qualifications, see *supra* note 23.

53. Record at 1547-49.

54. 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981).

55. In his opinion, Judge Brown merely incorporated many of the State's conclusions. Compare, e.g.:

Expert testimony on the "battered wife syndrome" by a psychiatric social worker to support defendant's claim of self-defense is inadmissible herein because (1) it is irrelevant and immaterial to the issue of whether defendant acted in self-defense at the time of the shooting; (2) the subject of the expert testimony is within the understanding of the jury; (3) the "battered wife syndrome" is not sufficiently developed, as a matter of commonly accepted scientific knowledge, to warrant testimony under the guise of expertise; and (4) its prejudicial impact outweighs its probative value.

Id. at 521-22, 423 N.E.2d at 140, with:

Expert testimony on the "battered woman", given by a psychiatric social worker in support of Defendant's claim of self-defense to the killing of her husband, is inadmissible on the grounds that: (1) it is irrelevant and immaterial to the issue of whether defendant acted in self-defense at the time of the shooting; (2) The subject of the expert testimony is within the understanding of the jury; (3) Its prejudicial impact outweighs its probative value; and (4) The "Battered Woman" concept is not sufficiently developed, as a matter of commonly accepted scientific knowledge, to warrant testimony under the guise of expertise.

Brief for Appellant at 4.

56. For a discussion of the special problems of the battered woman in asserting the self-defense claim, see Marcus, *Conjugal Violence: The Law of Force and the Force of Law*, 69 CALIF. L. REV. 1657, 1704-18 (1981).

57. See generally *State v. Robbins*, 59 Ohio St. 2d 74, 388 N.E.2d 755 (1979); *State v. Melchior*, 56 Ohio St. 2d 15, 381 N.E.2d 195 (1978).

58. *State v. Melchior*, 56 Ohio St. 2d 15, 20-21, 381 N.E.2d 195, 199 (1978). Besides establishing the requisite fear, the defendant must also show that the use of such force was the only means of escape and that he or she had no duty to retreat. *Id.*

59. *State v. Sheets*, 115 Ohio St. 308, 152 N.E. 664 (1926); *Napier v. State*, 90 Ohio St. 276, 107 N.E. 535 (1914); *Marts v. State*, 26 Ohio St. 162 (1875).

deciding whether the requisite fear was present.⁶⁰ Of special importance to the battered defendant is the jury's determination of the imminence issue;⁶¹ the defendant's perception of a threatening situation is likely to be very different from that of the typical juror.⁶² Thus, if expert testimony regarding a battered woman helps to explain her perception of imminent danger during the battering cycle, it is crucial in resolving the self-defense issue.

A. Relevancy of the Expert Testimony to the Self-Defense Claim

It is well established that evidence must be relevant to an issue in dispute to be admissible.⁶³ Difficulties arise, however, in defining relevancy and in applying the definition to the testimony offered in *Thomas*.

1. The Ohio Test for Relevancy

Ohio case law provides a well-established definition of relevancy. In *Barnett v. State*⁶⁴ the Ohio Supreme Court defined relevancy as "[a]ny matter of fact, the effect, tendency, or design of which, when presented to the mind, is to produce a persuasion concerning the existence of some other matter of fact—a persuasion either affirmative or disaffirmative of its existence."⁶⁵ The court also noted that the logical relation or causal connection among facts is a key to the determination of relevancy.⁶⁶

60. The jury instructions given in the *Thomas* case explained the importance of the defendant's subjective fear:

To constitute self-defense, ladies and gentlemen, there must have been on the part of Kathy Thomas a careful use of her faculties and reasonable grounds to honestly believe that she was in immediate danger to her person or to her life.

.....

In determining whether a Defendant such as Kathy Thomas had reasonable grounds for an honest belief that she was in imminent danger, you must put yourself in the position of . . . Kathy Thomas, with her characteristics, with her feelings, with the disparity of size between Daniels and the defendant . . . , with her knowledge or lack of knowledge, and under the same circumstances and conditions that surrounded her at the time the act was done.

66 Ohio St. 2d 518, 520 n.2, 423 N.E.2d 137, 139 n.2 (1981).

61. For a discussion of the imminency requirement, see W. LAFAVE & A. SCOTT, JR., *HANDBOOK ON CRIMINAL LAW* 394 (1972). The requirement has come under attack as applied to battered women. As one commentator noted:

Dissatisfaction with the imminence standard in the domestic assault context has centered on the general theme of inflexibility. It may be certain that a deadly attack will occur on the present occasion. . . . The imminent harm requirement could compel the defender to wait until the "sole opportunity" to take protective action has passed.

Marcus, *Conjugal Violence: The Law of Force and the Force of Law*, 69 CALIF. L. REV. 1657, 1710 (1981).

62. See *supra* text accompanying notes 37-50.

63. *Whiteman v. State*, 119 Ohio St. 285, 164 N.E. 51 (1928); OHIO R. EVID. 402.

64. 104 Ohio St. 298, 135 N.E. 647 (1922).

65. *Id.* at 306, 135 N.E. at 649-50 (quoting 1 J. BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 208 (1827)).

66. 104 Ohio St. 298, 306, 135 N.E. 647, 650 (1922). In *Dyer v. Isham*, 4 Ohio C.C. 429 (Cir. Ct. 1890), the court similarly stressed the logical connection required for relevancy. "Relevancy is that which conduces to the proof of a pertinent hypothesis. A pertinent hypothesis being one which, if sustained, would logically influence the issue." *Id.* at 433 (quoting 2 F. WHARTON, *A COMMENTARY ON LAW OF EVIDENCE* §§ 20-21 (2d ed. 1879)).

The *Ohio Rules of Evidence*, adopted in 1980, codified the existing case-law definition of relevancy.⁶⁷ Rule 401 states, "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."⁶⁸ The use of "any tendency" stresses the liberality of this standard.⁶⁹

2. Application of the Ohio Standard in *State v. Thomas*

In resolving the relevancy issue, Judge Brown merely concluded that the expert testimony proffered in *Thomas* was irrelevant to the question whether the defendant acted in self-defense.⁷⁰ To reach this conclusion under the correct relevancy standard, the court would have had to conclude that the testimony regarding the typical battered woman's perception of a threatening situation had no bearing on how this particular battered defendant perceived her situation.⁷¹ The court apparently failed to distinguish between evidence indirectly related to the self-defense claim and evidence having no bearing whatsoever on that issue. This confusion is evident from the following language in the opinion: "In a trial such as this one, where the evidence raises an issue of self-defense, the only admissible evidence pertaining to that defense is evidence which establishes that the defendant had a bona fide belief she was in imminent danger of death or great bodily harm"⁷² The phrase "which establishes" indicates that the court may be requiring either that the evidence directly establish the defense or that it have a strong tendency to prove the claimed defense. This requirement would conflict with Ohio law.⁷³ In *Rose v. State*⁷⁴ the court noted that "[i]t is not necessary . . . that the evidence should bear directly upon the issue. It is admissible if it tends to prove the issue, or constitutes a link in the chain of proof"⁷⁵ Ohio courts continually have recognized that evidence affecting the probability of a party's claim

67. "The rule [401] expresses the usual and general concept of relevancy" OHIO R. EVID. 402 staff note.

68. OHIO R. EVID. 401.

69. J. BLACKMORE & C. WEISSENBARGER, *ANDERSON'S OHIO EVIDENCE* 36 (1980) [hereinafter cited as BLACKMORE].

70. 66 Ohio St. 2d 518, 521, 423 N.E.2d 137, 140 (1981).

71. This is the position taken by the State. "Testimony about behavior patterns and psychological characteristics of battered women in general would have no bearing on whether the appellee perceived herself in imminent danger when she shot her common-law husband while he was sitting in a chair." Brief for Appellant at 5.

72. 66 Ohio St. 2d 518, 520, 423 N.E.2d 137, 139 (1981).

73. See *Tompkins v. Starr*, 41 Ohio St. 305 (1884) (when the issue was whether a brother had promised his sister that she could stay with him until her death, or only as long as he so wished, his evidence that he had knowledge of her ill temper and lack of congeniality at the time of the offer was held to be relevant); *Allison v. Horning*, 22 Ohio St. 138 (1871) (when the issue was to what price the parties had contracted, evidence presented by plaintiff showing value of work when the contract was made was held to be relevant); *Dyer v. Isham*, 4 Ohio C.C. 429 (Cir. Ct. 1890) (when the issue was whether the defendant had promised to repay a debt, evidence of his wealth held to be relevant since typically a rich man would be more likely to repay his debts).

74. 13 Ohio C.C. 342 (Cir. Ct. 1896), *aff'd*, 56 Ohio St. 779, 49 N.E. 1117 (1897).

75. *Id.* at 344 (quoting 1 S. GREENLEAF, *LAW OF EVIDENCE* § 51a (14th ed. 1883)).

is relevant.⁷⁶ Ohio's rule of evidence 401 incorporates this concept.⁷⁷ Thus, expert testimony on battered women is relevant to the defendant's self-defense claim if it has any tendency to affect the probability of her claim that she was in fear of death or great bodily harm.

The State argued that the testimony did not affect the probabilities of Thomas' self-defense claim because the expert had not interviewed the defendant personally.⁷⁸ The court adopted the State's conclusion on this point, but rejected its rationale: "Our conclusion would remain the same even if defendant's expert had personally interviewed defendant before being offered as a witness, even if defendant had conclusively established that defendant was, in fact, a battered wife" ⁷⁹ This position is erroneous in that the court first assumes the defendant may have been a battered woman and then finds that testimony regarding how being battered affects a woman's state of mind has no bearing on the defendant's state of mind. It is not surprising that of the other courts that have considered this issue,⁸⁰ only one even questioned relevancy.⁸¹

The court also found that the prejudicial impact of the evidence outweighed its probative value.⁸² This position is logically inconsistent with its claim that the evidence is irrelevant. The prejudice versus probative argument assumes that the evidence is relevant.⁸³ Thus, the court held that the evidence is both relevant and irrelevant. While it made sense for the State to argue in the alternative on these issues, the court's unqualified adoption of both grounds was rational only if its goal was to create confusion for future litigants. This inconsistency is reflective of the court's general lack of thoughtful analysis of the evidence issues in this case.

76. See *Tompkins v. Starr*, 41 Ohio St. 305 (1884); *Allison v. Horning*, 22 Ohio St. 138 (1871).

77. "'Relevant evidence' means evidence having any tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence." OHIO R. EVID. 401 (emphasis added).

78. Brief for Appellant at 5-6. "The alleged expert testified that he had not made any observation of the appellee. His testimony, therefore, could not have shed any light on the effect, if any, that years of abuse had upon the appellee's state of mind at the time she shot her husband." *Id.* (emphasis added). The court of appeals specifically rejected this personally interview argument. *State v. Thomas*, 17 Ohio Op. 3d 397, 406 (Ct. App. 1980), *rev'd*, 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981). Ohio's rule of evidence 703 also rejects the argument since it allows an expert to form an opinion based on his or her observation of the defendant at the trial itself. Also, an expert can draw his or her opinion from assumed facts given in hypothetical form. This rule is in accord with prior Ohio case law. OHIO R. EVID. 703 staff note; *Kraner v. Coastal Tank Lines*, 26 Ohio St. 2d 59, 269 N.E.2d 43 (1971).

79. 66 Ohio St. 2d 518, 520, 423 N.E.2d 137, 139 (1981). Even if the defense had offered unequivocal expert testimony that the defendant suffered from a "classic case" of battered wife syndrome the court's position would have remained unchanged. *Id.* at 521 n.3, 423 N.E.2d at 139-40 n.3.

80. The other cases are: *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979); *Hawthorne v. State*, 408 So. 2d 801 (Fla. Dist. Ct. App. 1982); *Smith v. State*, 247 Ga. 612, 277 S.E.2d 678 (1981); *State v. Griffiths*, 101 Idaho 163, 610 P.2d 522 (1980); *People v. White*, 90 Ill. App. 3d 1067, 414 N.E.2d 196 (1980); *State v. Anaya*, 438 A.2d 892 (Me. 1981); *State v. Baker*, 120 N.H. 773, 424 A.2d 171 (1980); *Buhrle v. State*, 627 P.2d 1374 (Wyo. 1981).

81. See *People v. White*, 90 Ill. App. 3d 1067, 1072, 414 N.E.2d 196, 200 (1980) (evidence found to be irrelevant).

82. 66 Ohio St. 2d 518, 521-22, 423 N.E.2d 137, 140 (1981).

83. OHIO R. EVID. 403(A): "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." (emphasis added). This rule reflects prior Ohio case law. OHIO R. EVID. 403 staff note.

In determining the relevancy issue, then, the court made three errors. First, the court implied that only direct evidence could be admitted to support the defendant's self-defense claim.⁸⁴ Second, it accepted the State's conclusion that the expert testimony had no bearing on the defendant's state of mind, but rejected the State's rationale for this position, leaving its holding not only unsupported, but unsupportable.⁸⁵ Finally, the court without qualification adopted logically inconsistent grounds for its decision; its reasoning implied that the evidence was both relevant and irrelevant.⁸⁶

B. The Helpfulness of Expert Testimony Concerning Battered Women

The parties and the judges involved in this litigation expressed strongly differing opinions on whether expert testimony on the subject of battered women would be helpful to the jury.⁸⁷ The Ohio Supreme Court found that expert testimony on this topic was unnecessary.⁸⁸ Other jurisdictions are divided on this question.⁸⁹ Although Ohio law provides a well-defined standard for determining when expert testimony can be admitted, the application of the standard often turns on the elusive question of what is within the common understanding of the average layperson.

1. The Ohio Standard for Expert Testimony

Ohio courts repeatedly have held that to be admissible, expert testimony must concern a subject that is beyond the common knowledge of the average person so that the expert evidence will assist the jury in determining a question of fact.⁹⁰ In *McKay Machine Co. v. Rodman*⁹¹ the court stated:

84. See *supra* text accompanying notes 70-77.

85. See *supra* text accompanying notes 78-81.

86. See *supra* text accompanying notes 82-83.

87. Compare "[T]he literature clearly establishes that the subject of the battered woman, and especially her unique physical characteristics and differences in reaction and perception, is not one within the knowledge and comprehension of the average person," *State v. Thomas*, 17 Ohio Op. 3d 397, 405 (Ct. App. 1980), *rev'd*, 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981) (majority opinion of the court of appeals), with "Certainly, a jury can readily appreciate and understand the effect upon a person that years of abuse would have, without the aid of expert testimony," Brief for Appellant at 6, and with "There is no question that the issue of battered women is beyond the common knowledge of the average person," Brief for Appellee at 3, and with "The jury is well able to understand and determine whether self-defense has been proven in a murder case without expert testimony such as that offered here," *State v. Thomas*, 66 Ohio St. 2d 518, 521, 423 N.E.2d 137, 139 (1981).

88. 66 Ohio St. 2d 518, 521, 423 N.E.2d 137, 140 (1981).

89. The cases in which the testimony was found helpful include: *Ibn-Tamas v. United States*, 407 A.2d 626, 635 (D.C. 1979); *Smith v. State*, 247 Ga. 612, 277 S.E.2d 678 (1981); *State v. Anaya*, 438 A.2d 892 (Me. 1981); and *State v. Baker*, 120 N.H. 773, 424 A.2d 171 (1980). The cases in which the testimony was found unhelpful include: *State v. Griffiths*, 101 Idaho 163, 610 P.2d 522 (1980); *People v. White*, 90 Ill. App. 3d 1067, 414 N.E.2d 196 (1980); and *Buhrle v. State*, 627 P.2d 1374 (Wyo. 1981). In these three cases, however, the courts distinguished their cases from those in which the testimony has been admitted, which suggests that under different circumstances they might find such evidence helpful.

90. *Ragone v. Vitali & Beltrami*, 42 Ohio St. 2d 161, 327 N.E.2d 645 (1975); *McKay Mach. Co. v. Rodman*, 11 Ohio St. 2d 77, 228 N.E.2d 304 (1967); *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452 (1853). But see *Lake Shore & Mich. S. Ry. v. Terry*, 14 Ohio C.C. 536 (Cir. Ct. 1897) (if the court believes that the expert opinion will aid the jury, it can admit the evidence even though it is not really in an area requiring an expert).

91. 11 Ohio St. 2d 77, 228 N.E.2d 304 (1967).

[T]his court has continuously held that in all proceedings involving matters of a scientific, mechanical, professional, or other like nature, requiring special study, experience or observation not within the knowledge of laymen in general, expert opinion testimony is admissible to aid the court or jury in arriving at a correct determination of the litigated issue.⁹²

Although the *Ohio Rules of Evidence* basically adopted this standard,⁹³ there now appears to be more emphasis on whether the expert will assist the jury than on whether the subject is beyond the common knowledge of the average person. Rule 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."⁹⁴ Therefore, under Ohio law expert testimony is admissible when it will assist the trier of fact to evaluate information in an area with which it is not completely familiar.

2. Application of the Ohio Standard in *State v. Thomas*

The crucial question in applying the Ohio standard is whether the expert testimony will assist the jury.⁹⁵ This, in turn, is dependent upon how well the jury understands the subject matter of the testimony. The key question in *Thomas*, therefore, is whether the jury understood spousal abuse to such an extent that expert testimony would not have assisted its determination whether the defendant was in fear of death or great bodily harm when she shot Daniels.

The Ohio Supreme Court found the topic of battered women to be well understood by the public.⁹⁶ The court is not alone in this view. In *State v. Griffiths*⁹⁷ the Idaho Supreme Court held that psychiatric testimony regarding whether the defendant had been in fear when she killed her alleged attacker was inadmissible since fear is a common emotion that the jury could understand without an expert.⁹⁸ In two other cases expert testimony on battered women was found unnecessary for the jury's determination of the self-defense issue.⁹⁹ However, those courts did not base their decisions on the belief that wife beating is well understood by the public.¹⁰⁰

92. *Id.* at 81, 228 N.E.2d at 307.

93. See OHIO R. EVID. 702 staff note; BLACKMORE, *supra* note 69, at 105.

94. OHIO R. EVID. 702.

95. See *supra* text accompanying notes 90-94.

96. 66 Ohio St. 2d 518, 521, 423 N.E.2d 137, 140 (1981). But see *State v. Thomas*, 17 Ohio Op. 3d 397, 408 (Ct. App. 1980) (Krupansky, J., dissenting), *rev'd*, 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981), which seems to suggest that in the appropriate case, such testimony would be helpful. Judge Krupansky, later a member of the Ohio Supreme Court, took part in the court of appeals' decision in *Thomas*.

97. 101 Idaho 163, 610 P.2d 522 (1980).

98. *Id.* at 165, 610 P.2d at 524.

99. See *People v. White*, 90 Ill. App. 3d 1067, 414 N.E.2d 196 (1980); *Buhrle v. State*, 627 P.2d 1374 (Wyo. 1981).

100. In *People v. White*, 90 Ill. App. 3d 1067, 414 N.E.2d 196 (1980), a physician who had treated battered women in his practice was prohibited by the trial court from expressing his opinion why these women stayed

The Georgia Supreme Court adopted the opposite position on this issue. In *Smith v. State*¹⁰¹ it stated:

The trial court . . . found that the jurors could draw their own conclusions as to whether the defendant acted in fear of her life. We disagree and find that . . . why a person suffering from battered woman's syndrome would not leave her mate, would not inform police or friends, and would fear increased aggression against herself, would be such conclusions that jurors could not ordinarily draw for themselves.¹⁰²

The Court of Appeals for the District of Columbia and a Florida court of appeals have also determined that expert testimony can provide the jury with otherwise unavailable insight into the battering relationship.¹⁰³ It is doubtful that the average person's exposure to or knowledge of wife beating varies significantly from jurisdiction to jurisdiction. Thus, the opposing outcomes on this issue are more likely the results of the judges' own biases on the subject of battered women, rather than any regional differences in the public's understanding of wife abuse.

3. *The Jury's Understanding of Battering*

It is only within the last decade that a significant amount of research on battered women has been conducted.¹⁰⁴ Several of these studies indicate that the general public does not understand spouse abuse. According to Dr. Lenore Walker:

The battering of women, like other crimes of violence against women, has been shrouded in myths. All of the myths have perpetuated the mistaken notion that the victim has precipitated her own assault. Some of them served as a protection against embarrassment. Others were created to protect rescuers from their own discouragement when they were unsuccessful in stopping the brutality. It is important to refute all the myths surrounding battered women in order to understand fully why battering happens, how it affects people, and how it can be stopped.¹⁰⁵

A study of domestic violence in Ohio revealed similar findings: "The silence about mate abuse has created shame, guilt, and isolation for the victims.

with their abusers. The court found no error in the exclusion of this testimony because it had "no useful purpose." However, the court differentiated the doctor's testimony from that of a psychologist who would approach the topic from a psychological perspective. *Id.* at 1072, 414 N.E.2d at 200. In *Buhrle v. State*, 627 P.2d 1374 (Wyo. 1981), the court found the testimony unhelpful because of its "inadequate foundation." *Id.* at 1378.

101. 247 Ga. 612, 277 S.E.2d 678 (1981).

102. *Id.* at 619, 277 S.E.2d at 683.

103. *Ibn-Tamas v. United States*, 407 A.2d 626, 634 (D.C. 1979); *Hawthorne v. State*, 408 So. 2d 801, 806 (Fla. Dist. Ct. App. 1982).

104. See generally ATTORNEY GENERAL'S TASK FORCE ON DOMESTIC VIOLENCE, THE REPORT FROM THE ATTORNEY GENERAL'S TASK FORCE ON DOMESTIC VIOLENCE (1978); J. FLEMING, STOPPING WIFE ABUSE (1979); R. LANGLEY & R. LEVY, WIFE BEATING: THE SILENT CRISIS (1977); D. MARTIN, BATTERED WIVES (1976); E. PIZZEY, SCREAM QUIETLY OR THE NEIGHBORS WILL HEAR (1977); L. WALKER, *supra* note 29; Martin, *Battered Women: Society's Problem*, in THE VICTIMIZATION OF WOMEN 111 (J. Chapman & M. Gates eds. 1978); Walker, *Treatment Alternatives for Battered Women*, in THE VICTIMIZATION OF WOMEN 143 (J. Chapman & M. Gates eds. 1978); N. JAFFE, ASSAULTS ON WOMEN; RAPE AND WIFE BEATING (Public Affairs Pamphlet No. 579, 1980).

105. L. WALKER, *supra* note 29, at 18.

Community attitudes have created myths and misunderstandings, especially that those who remain in abusive homes, enjoy the beatings. The lack of information allows the community to deny the existence of the problem."¹⁰⁶ The same study indicated that the legal community shares the general public's misconceptions concerning battered women since it is a topic ignored by law schools.¹⁰⁷

Of the numerous myths exposed by researchers,¹⁰⁸ two are particularly intertwined with the believability of a battered woman's self-defense claim. First is the misconception that instead of fearing physical abuse, the battered woman enjoys it.¹⁰⁹ A juror harboring this notion is likely to doubt a battered woman's claim that she was in fear for her life when she killed her attacker. The second myth likely to interfere with the jury's evaluation of the evidence is that a woman truly fearful of the abuser will leave him, or at least seek outside help.¹¹⁰ This failure to appreciate the battered woman's social, emotional, and economic position causes jurors to evaluate the defendant's testimony in light of their own notions about why a battered woman would stay with, or return to, her abuser.¹¹¹ As noted in *Ibn-Tamas v. United States*,¹¹² expert testimony will add credibility to the defendant's testimony concerning both her relationship with the deceased and her state of mind when she killed him.¹¹³ In *Ibn-Tamas* the District of Columbia Court of Appeals went on to explain:

Dr. Walker's contribution, accordingly, would have been akin to the psychiatric testimony admitted in the case of Patricia Hearst "to explain the effects kidnapping, prolonged incarceration, and psychological and physical abuse may have had on the defendant's mental state at the time of the robbery, insofar as such mental state is relevant to the asserted defense of coercion or duress."¹¹⁴

C. *The State of the Art Issue*

Judge Brown's third ground for finding testimony on battered women inadmissible was that "'battered wife syndrome' is not sufficiently developed,

106. ATTORNEY GENERAL'S TASK FORCE ON DOMESTIC VIOLENCE, THE REPORT FROM THE ATTORNEY GENERAL'S TASK FORCE ON DOMESTIC VIOLENCE 21 (1978).

107. *Id.* at 18.

108. Walker enumerated 21 commonly held myths. L. WALKER, *supra* note 29, at 19-31.

109. For a discussion of the masochism theory, see J. FLEMING, STOPPING WIFE ABUSE 74-81 (1979); R. LANGLEY & R. LEVY, WIFE BEATING: THE SILENT CRISIS 78, 123-25 (1977); L. WALKER, *supra* note 29, at 20.

110. For a discussion of why the battered woman stays with her abuser, see ATTORNEY GENERAL'S TASK FORCE ON DOMESTIC VIOLENCE, THE REPORT FROM THE ATTORNEY GENERAL'S TASK FORCE ON DOMESTIC VIOLENCE 22 (1978); J. FLEMING, STOPPING WIFE ABUSE 81-95 (1979); R. LANGLEY & R. LEVY, WIFE BEATING: THE SILENT CRISIS 111-23 (1977); D. MARTIN, BATTERED WIVES 72-86 (1976); and L. WALKER, *supra* note 29, at 42-54.

111. In her brief Thomas argued: "Without expert testimony which explains the battered woman syndrome and how it relates to the reasonableness of her actions, she cannot receive a fair trial from a jury which is part of the ignorant public." Brief for Appellee at 6. In *Hawthorne v. State*, 408 So. 2d 801 (Fla. Dist. Ct. App. 1982), the court noted, "It is precisely because a jury would not understand why appellant would remain in the environment that the expert testimony would have aided them in evaluating the case." *Id.* at 807.

112. 407 A.2d 626, 634 (D.C. 1979).

113. *Id.*

114. *Id.* (quoting *United States v. Hearst*, 412 F. Supp. 889, 890 (N.D. Cal. 1976)).

as a matter of commonly accepted scientific knowledge, to warrant testimony under the guise of expertise"¹¹⁵ The court cited *Frye v. United States*¹¹⁶ to support its conclusion.¹¹⁷ Although *Frye's* state of the art test is applicable for certain types of scientific evidence, it was both inappropriate and incorrectly applied here.

1. *The General Acceptance Standard—Frye v. United States*

In *Frye v. United States*¹¹⁸ the District of Columbia Court of Appeals held that the results of a polygraph test were inadmissible because the device was not generally recognized by physiological and psychological authorities.¹¹⁹ The court stated:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, *the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.*¹²⁰

The *Frye* standard requires that the test or methodology used to deduce certain scientific evidence be generally accepted in its relevant field. Accordingly, expert testimony is inadmissible when based on principles or devices that are still viewed as experimental, regardless of how accurate the principle or device is shown to be.¹²¹

2. *Decline of the Frye Standard*

Although *Frye* still is cited extensively, many courts have either altered¹²² or rejected completely¹²³ its standard. In *State v. Souel*¹²⁴ the Ohio Supreme Court also retreated from the *Frye* standard. In *Souel* it held that

115. 66 Ohio St. 2d 518, 522, 423 N.E.2d 137, 140 (1981).

116. 293 F. 1013 (D.C. Cir. 1923).

117. 66 Ohio St. 2d 518, 521, 423 N.E.2d 137, 139 (1981).

118. 293 F. 1013 (D.C. Cir. 1923).

119. *Id.* at 1014.

120. *Id.* (emphasis added).

121. 21 S. TEX. L.J. 62, 63-64 (1980).

122. One element of the standard that has been subject to alteration is the determination of who must have generally accepted the technique or procedure. In *Frye* the court rejected the use of polygraph evidence because psychological and physiological experts had not recognized the procedure. 293 F. 1013, 1014 (D.C. Cir. 1923). In *People v. Williams*, 164 Cal. App. 2d Supp. 858, 331 P.2d 251 (App. Dep't Super. Ct. 1958), a California appellate court held that scientific evidence was admissible if it had been "generally accepted by those who would be expected to be familiar with its use." *Id.* at 862, 331 P.2d at 254. This redefinition of the appropriate scientific community that must have accepted the procedure is now generally followed by courts. A. MOENSSENS & F. INBAU, SCIENTIFIC EVIDENCE IN CRIMINAL CASES 5 (2d ed. 1978). But see *United States v. Addison*, 498 F.2d 741, 745 (D.C. Cir. 1974) (voice print evidence held inadmissible because it had not been generally accepted by the "scientific community as a whole").

123. *E.g.*, *Coppolino v. State*, 223 So. 2d 68, 70 (Fla. Dist. Ct. App. 1968), *appeal denied*, 234 So. 2d 120 (Fla. 1969), *cert. denied*, 399 U.S. 927 (1970) (even though method for detecting succinylcholine chloride in body tissue not generally accepted in field of pathology, the trial court had not erred by admitting results since witness had shown the procedure's "reasonable demonstrability"); *State v. Williams*, 388 A.2d 500 (Me. 1978):

[I]n regard to the admissibility of expert testimony, we conclude that there is no justifiable distinction in principle arising because such expert testimony may happen to involve newly ascertained or newly

polygraph results were admissible provided the following conditions were met: (1) All parties and counsel must sign a written stipulation that the defendant would submit to the test and that the evidence would be admitted; (2) the trial judge must be convinced that the examiner was qualified and the examination was properly conducted; (3) if the results and the examiner's opinions are offered as evidence, the nonoffering party may cross-examine the expert regarding his qualifications, the conditions under which the tests were conducted, the possibilities of error, and any other matter the trial court finds relevant; and (4) if the evidence is admitted, the jury shall be instructed that the evidence is not to be treated as conclusive of the defendant's guilt or innocence.¹²⁵ The court adopted¹²⁶ these requirements from *State v. Valdez*,¹²⁷ a case decided by the Supreme Court of Arizona. In *Valdez* the court held that even though the polygraph had not attained the general acceptance required by *Frye*, it had reached "a state in which its results are probative enough to warrant admissibility upon stipulation."¹²⁸ Similarly, the Ohio Supreme Court noted:

*Despite the ongoing controversy concerning the degree of accuracy of the polygraph device, it is our opinion that observance of the Valdez qualifications establishes a proper foundation for the admission of polygraph test results, and that these results have probative value in the determination of whether the examinee has been deceptive during interrogation.*¹²⁹

About the *Frye* standard the court stated that "[t]his standard for admissibility of polygraph evidence has not gone unchallenged, and some commentators contend that normal evidentiary requirements should be substituted for the *artificially high test* first established in *Frye*."¹³⁰ The court then quoted with approval two passages from McCormick's treatise. The thrust of the first passage was that the normal evidentiary rules provide a sufficient threshold for scientific evidence:¹³¹ "If the courts used this approach, instead of repeating a supposed requirement of 'general acceptance' not elsewhere imposed, they would arrive at a practical way of utilizing the results of scientific

applied scientific principles. The controlling criteria regarding the admissibility of expert testimony, so long as the proffered expert is qualified and probative value is not substantially outweighed by the factors mentioned in Rule 403, are whether in the sound judgment of the presiding Justice the testimony to be given is relevant and will assist the trier of fact to understand the evidence or to determine a fact in issue.

Id. at 503-04. See generally A. MOENSSSENS & F. INBAU, SCIENTIFIC EVIDENCE IN CRIMINAL CASES 5-8 (2d ed. 1978); Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, A Half-Century Later*, 80 COLUM. L. REV. 1197, 1228-30 (1980); 64 CORNELL L. REV. 875 (1979); 48 GEO. WASH. L. REV. 774 (1980); 21 S. TEX. L.J. 62, 70 (1980).

124. 53 Ohio St. 2d 123, 372 N.E.2d 1318 (1978).

125. *Id.* at 132, 372 N.E.2d at 1323.

126. *Id.* at 133, 372 N.E.2d at 1323.

127. 91 Ariz. 274, 371 P.2d 894 (1962).

128. *Id.* at 283, 371 P.2d at 900.

129. *State v. Souel*, 53 Ohio St. 2d 123, 133, 372 N.E.2d 1318, 1323-24 (1978) (emphasis added, footnote omitted).

130. *Id.* at 130 n.4, 372 N.E.2d at 1322 n.4 (emphasis added).

131. *Id.* at 130-31 n.4, 372 N.E.2d at 1322 n.4.

advances.'"¹³² In the second passage McCormick noted and criticized the judicial hesitancy towards polygraph evidence.¹³³ Thus, *Souel* establishes that the *Frye* standard is no longer applicable to polygraph evidence in Ohio when the four prerequisites are met. Further, the *Ohio Rules of Evidence* do not address the standard for admissibility of novel scientific evidence in Ohio courts,¹³⁴ and therefore do not affect this question.

The *Thomas* decision, therefore, creates a double standard for the admissibility of scientific evidence in Ohio.¹³⁵ Even though the general acceptance standard is no longer applicable to polygraph results¹³⁶—the precise type of evidence that gave rise to the standard¹³⁷—the court imposed the *Frye* standard upon expert testimony concerning battered women without any explanation of this inconsistency. As one commentator has noted, "Instead of using *Frye* as an analytical tool to decide whether novel scientific evidence should be admitted, it appears that many courts apply it as a label to justify their own views about the reliability of particular . . . techniques."¹³⁸

3. *Appropriateness of the Frye Standard for Evidence Not Involving a Test or Device*

Even if the *Frye* standard were in full force in Ohio, the type of evidence at issue in *Thomas* should not have triggered its application. While the *Frye* test may be applicable to evidence generated from polygraphs, intoxication tests, and speed radar devices, it is inapplicable to psychiatric or psychological testimony not involving tests or devices.¹³⁹ In referring to psychiatric evidence a commentator noted:

It is obvious that this form of evidence—which purports to be scientific, although admittedly more "social" in background—has been more readily and easily accepted by courts than the more objective "physical" evidence from scientific devices. The rule of the *Frye* case has not been applied to this field, apparently because the evidence in opinion form is not tantamount to being the result of a device or mechanical instrument.¹⁴⁰

One of the criticisms lodged against *Frye* is that it does not apply to psychiat-

132. *Id.* at 131 n.4, 372 N.E.2d at 1322 n.4 (quoting MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 203, at 491 (E. Cleary 2d ed. 1972)).

133. 53 Ohio St. 2d 123, 131 n.4, 372 N.E.2d 1318, 1322-23 n.4 (1978).

134. OHIO R. EVID. 702 staff note. For a discussion of how the enactment of the *Federal Rules of Evidence* is viewed as affecting such evidence, see Giannelli, *supra* note 123, at 1239-45.

135. For a discussion of how other courts have developed similar double standards for scientific evidence, see Giannelli, *supra* note 123, at 1219-21.

136. See *supra* text accompanying notes 124-34.

137. See *supra* text accompanying notes 118-19.

138. Giannelli, *supra* note 123, at 1221.

139. Boyce, *Judicial Recognition of Scientific Evidence in Criminal Cases*, 8 UTAH L. REV. 313, 324-25 (1964).

140. *Id.* at 324.

ric evidence and thus creates a double standard¹⁴¹—one that is the exact inverse of Ohio's present double standard.¹⁴²

While the underlying rationale of *Frye* may justify the standard's application to physical evidence generated from scientific devices, it does not justify its application to the softer type of evidence generated from psychological studies. The judicial hesitancy to admit scientific evidence is in part because of the belief that the jury will view the test or device as infallible.¹⁴³ For example, evidence produced by the polygraph, the use of truth-serum, and mathematical certainties is likely to be viewed as determinative by the jury.¹⁴⁴ Since the results from these tests often go directly to the guilt or innocence of the accused, the cost of error is great. In contrast, juries do not accept the soft information resulting from psychological studies with the same deference. The jurors' individual experiences with human behavior deter them from viewing the evidence as infallible. Moreover, expert testimony about how the typical battered woman perceives danger does not go directly to the guilt or innocence of the defendant, and thereby lessens the cost of error. In short, the concerns raised by the use of demonstrative scientific evidence are simply not presented by expert evidence of battered women's syndrome.

4. *Application of the Frye Standard to the Expert's Methodology*

If the *Frye* standard is applicable at all to this type of psychological evidence,¹⁴⁵ its application is limited to the expert's methodology,¹⁴⁶ and does not pertain to his or her conclusions.¹⁴⁷ This is established by the language of *Frye*: "*The thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.*"¹⁴⁸

141. "[T]he *Frye* standard has been criticized as overly rigorous and as introducing an element of inconsistency into the law of evidence. Thus, it is asked, why should the polygraph, for example, be held to a standard apparently different from that applied to the principles of Freudian psychology?" Strong, *Questions Affecting the Admissibility of Scientific Evidence*, 1970 U. ILL. L.F. 1, 11 (footnotes omitted).

142. See *supra* text accompanying notes 135-38.

143. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 203, at 490 n.32 (E. Cleary 2d ed. 1972).

144. *Id.*

145. For a discussion of why it is not applicable, see *supra* text accompanying notes 139-40.

146. "Methodology" as used here means a system of analysis or procedure for study.

147. This reasoning was advanced by the court in *Ibn-Tamas v. United States*, 407 A.2d 626, 638-39 (D.C. 1979).

148. 293 F. 1013, 1014 (D.C. Cir. 1923) (emphasis added). But see *Dyas v. United States*, 376 A.2d 827 (D.C.), cert. denied, 434 U.S. 973 (1977). "[E]xpert testimony is inadmissible if 'the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted even by an expert.'" *Id.* at 832 (quoting MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 13 (E. Cleary 2d ed. 1972)). In *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979), the court insisted its language in *Dyas* only required a general acceptance of the scientific methodology, not of the particular results based on that methodology. It explained its reasoning as follows:

It is true that the state of scientific knowledge itself can be so meager in a particular field of study that courts will preclude reliance on expert testimony about it, . . . but such instances merely reflect the court's conclusion that no methodology for making the inquiry has been discovered; the proffer did not meet a threshold test of believability.

Id. at 638 (citation omitted).

This distinction between methodology and the subject matter being studied has generated confusion for courts attempting to apply the general acceptance standard to expert testimony on battered women. In *Buhrle v. State*¹⁴⁹ it is difficult to tell whether the court found the expert's methodology insufficient, her findings insufficient, or both.¹⁵⁰ The *Thomas* opinion demonstrated a similar lack of clarity.¹⁵¹ Only in *Ibn-Tamas v. United States*¹⁵² has a court addressed the distinction between methodology and findings.¹⁵³

The final question to be answered, therefore, is how the methodology¹⁵⁴ of the expert offered in *Thomas* would fare in light of the *Frye* standard. The State addressed this issue in its brief: "The record is devoid of evidence concerning the general acceptance of the expert's methodology for identifying and studying battered women. . . . Nothing was said of the techniques for interviewing, the duration of the interview, the number of times each woman was interviewed or any follow-up."¹⁵⁵ While the State's assertions are correct, it must be noted that the defendant's expert, Gerald Buckley, was not claiming to base his opinions on any particular systematic study or test. Rather, his conclusions were based upon his 10 years of experience in working with battered women, part of which included studying over 300 abused women.¹⁵⁶ Thus, Buckley's methodology for arriving at his conclusions, if he indeed had one, was his experience with battered women. Clearly, the *Frye* standard cannot be applied to an expert's experience in a particular area. This is one reason courts have exempted from the general acceptance standard psychological and psychiatric evidence not involving tests or devices.¹⁵⁷ Experience with a subject in and of itself is a valid basis for forming an expert opinion,¹⁵⁸ even when the area is clearly scientific in nature and established methodologies exist.¹⁵⁹ Thus, having a methodology that is generally accepted is necessary only when the expert's opinions are based upon or are the result of that methodology.

149. 627 P.2d 1374 (Wyo. 1981).

150. See *id.*

151. Initially, the court noted that "no general acceptance of the expert's particular methodology has been established." 66 Ohio St. 2d 518, 521, 423 N.E.2d 137, 139 (1981) (footnote omitted). In the following paragraph, however, the court indicated that it was the subject matter that was insufficient. "[T]he 'battered wife syndrome' is not sufficiently developed, as a matter of commonly accepted scientific knowledge, to warrant testimony under the guise of expertise." *Id.* at 521-22, 423 N.E.2d at 140.

152. 407 A.2d 626 (D.C. 1979).

153. *Id.* at 638-39. The court remanded the case for a determination whether the expert's methodology met the *Frye* standard. On remand the trial judge found that the expert's methodology had not been shown to be generally accepted. This decision is now on appeal. Sternberg, *Admissibility of Expert Testimony on Battering*, in WOMEN'S SELF-DEFENSE CASES 210, 217 (E. Bochnak ed. 1981).

154. For a discussion of the expert's qualification, see *supra* note 23.

155. Brief for Appellant at 7.

156. *State v. Thomas*, 17 Ohio Op. 3d 397, 406 (Ct. App. 1980), *rev'd*, 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981).

157. For a discussion of this exception, see *supra* text accompanying notes 139-40.

158. OHIO R. EVID. 702.

159. *E.g.*, *State v. Maupin*, 42 Ohio St. 2d 473, 330 N.E.2d 708 (1975) (a police officer experienced in narcotics was permitted to give his opinions regarding the identification of a drug even though he had conducted no scientific analysis upon the substance).

The Ohio Supreme Court made three errors in dealing with the state of the art issue in *Thomas*. First, it applied *Frye's* general acceptance standard, which it had rejected previously.¹⁶⁰ Second, it failed to realize that this standard was inappropriate for psychological evidence not based upon a test or study.¹⁶¹ Finally, it failed to distinguish between the subject of battered women and the methods used to study the topic. As a result, the court failed to realize that Buckley had offered an opinion based not on any methodology but rather on his extensive experience with battered women.¹⁶²

D. *Prejudicial Impact Versus Probative Value*

The court's final argument for finding the expert testimony regarding battered women inadmissible was that its prejudicial impact outweighed its probative value:¹⁶³ "[W]e believe the expert testimony offered here would tend to stereotype defendant, causing the jury to become prejudiced. It could decide the facts based on typical, and not the actual, facts."¹⁶⁴

Ohio's evidence rule 403(A) defines Ohio's standard for evidence that is more prejudicial than probative: "Although relevant, evidence is not admissible if its probative value is *substantially outweighed* by the danger of *unfair prejudice*, of confusion of the issues, or of misleading the jury."¹⁶⁵ This rule restates prior Ohio case law.¹⁶⁶

Balancing probative value against prejudicial impact is a difficult task that calls for careful case by case analysis.¹⁶⁷ A court first must consider whether the introduction of the evidence will have an unfair prejudicial impact on the jury. The "mere possibility" that the evidence may have such an impact is not sufficient to trigger the application of this test.¹⁶⁸ If the court reaches an affirmative conclusion in this first step, it must then determine the probative value of the offered evidence. Finally, the court must weigh the prejudicial impact against the probative value and exclude the evidence only if the former substantially outweighs the latter.¹⁶⁹

While the Ohio rule offers no definition of unfair prejudice,¹⁷⁰ the advisory committee's note to its federal counterpart does: "'Unfair prejudice'

160. See *supra* text accompanying notes 124-34.

161. See *supra* text accompanying notes 139-40.

162. See *supra* text accompanying notes 145-59.

163. 66 Ohio St. 2d 518, 522, 423 N.E.2d 137, 140 (1981).

164. *Id.* at 521, 423 N.E.2d at 140. Cf. *Dyer v. Isham*, 4 Ohio C.C. 429, 433-34 (Cir. Ct. 1890) (evidence that defendant was a wealthy man when he allegedly promised to repay a debt admissible since typically a rich man would be more likely to make such a promise).

165. OHIO R. EVID. 403 (emphasis added).

166. *Id.* staff note.

167. BLACKMORE, *supra* note 69, at 40.

168. *Id.* at 15.

169. OHIO R. EVID. 403.

170. Ohio case law similarly is devoid of a thorough explanation of what constitutes unfair prejudice. What little case law there is has generally involved personal injury claims. See *Hudock v. Youngstown Mun. Ry.*, 164 Ohio St. 493, 132 N.E.2d 108 (1956); *Toledo, Col. & O. Riv. R.R. v. Miller*, 103 Ohio St. 17, 132 N.E. 156 (1921); *Johnson v. Knipp*, 36 Ohio App. 2d 218, 304 N.E.2d 914 (Ct. App. 1973); *Cushman Motor Delivery Co. v. Smith*, 51 Ohio App. 421, 1 N.E.2d 628 (Ct. App. 1935).

within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.”¹⁷¹ Evidence of this sort typically “appeals to the jury’s sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action”¹⁷²

The initial issue in applying this analysis to the *Thomas* case, therefore, is whether testimony by an expert regarding his experience with battered women would unfairly prejudice the jury by encouraging a decision based on improper reasoning. In this regard, Judge Brown expressed concern that the jury would unduly stereotype the defendant and thus ignore the actual facts of the case.¹⁷³ This reasoning ignores the likelihood that the jury already had stereotyped Thomas as a masochist who thrived on brutality.¹⁷⁴ Thus, the probative value of the evidence becomes apparent: the offered testimony would serve to educate the jury and thereby add to the credibility of the defendant’s self-defense claim.¹⁷⁵ Given the “substantially outweighed” standard required for exclusion, it is difficult to understand how the balance could be struck otherwise than for the defendant. This is especially true because of the fact that when the prejudice versus probative issue is considered on appeal, the usual practice is “to view both probative force and prejudice most favorably towards the proponent”¹⁷⁶

In its brief the State raised another objection to the evidence: that it would overemphasize Daniels as a “battering husband.”¹⁷⁷ While the Ohio Supreme Court did not address this argument, the court in *Ibn-Tamas v. United States*¹⁷⁸ did. That court reasoned that since the trial judge had admitted other evidence tending to establish the decedent’s violent nature, any prejudicial impact from the testimony would be minimal.¹⁷⁹ It concluded that the testimony’s probative value outweighed its prejudicial impact as a matter of law.¹⁸⁰ Considering the testimony heard by the jury in *Thomas*,¹⁸¹ the reasoning of *Ibn-Tamas* clearly rebuts the State’s contention that the expert testimony about Daniel’s violent nature would be prejudicial.

After considering the prejudice versus probative argument, the Maine Supreme Judicial Court in *State v. Anaya*¹⁸² reached the same conclusion as the *Ibn-Tamas* court. In *Anaya* the trial judge excluded expert testimony concerning battered women because, among other things, it was found to be

171. FED. R. EVID. 403 advisory committee’s note.

172. 1 J. WEINSTEIN & M. BERGER, WEINSTEIN’S EVIDENCE ¶ 403[03] (1981) (footnotes omitted).

173. 66 Ohio St. 2d 518, 521, 423 N.E.2d 137, 140 (1981).

174. See *supra* text accompanying notes 105–13.

175. See *supra* text accompanying notes 108–14.

176. 1 J. WEINSTEIN & M. BERGER, *supra* note 172, at ¶ 403[03].

177. Brief for Appellant at 6.

178. 407 A.2d 626 (D.C. 1979).

179. *Id.* at 639.

180. *Id.*

181. See *supra* text accompanying notes 18–21.

182. 438 A.2d 892 (Me. 1981).

prejudicial and confusing to the jury.¹⁸³ The Maine Supreme Judicial Court held that the exclusion on that ground constituted a reversible error.¹⁸⁴ The court explained:

Interpreting the decision below as one based on Rule 403, we find such an abuse of discretion. Both [experts'] testimonies were highly probative and more helpful than confusing to the jury. The record shows that Dr. Bishop would have testified that . . . abused women perceive suicide and/or homicide to be the only solutions to their problems. This evidence would have given the jury reason to believe that the defendant's conduct was, contrary to the State's assertions, consistent with her theory of self-defense.¹⁸⁵

In ruling on the admissibility of the expert testimony, the trial judge in *Thomas* did not give the prejudicial-versus-probative ground as a reason for excluding the evidence.¹⁸⁶ He had the best opportunity to consider the possible prejudicial impact of the testimony since he was acquainted with the circumstances. A trial transcript alone cannot provide this sensitivity. Thus, it made little sense for Judge Brown to raise this issue at all, especially since he found the evidence irrelevant, and thus, as a matter of law, without probative value¹⁸⁷ to be outweighed by the prejudicial impact on the jury.

IV. THE EFFECT OF *STATE V. THOMAS*

It is unclear what effects the *Thomas* decision will have on the future use of expert testimony concerning battered women. Even though the State unequivocally urged the court to find the evidence inadmissible as a matter of law,¹⁸⁸ the opinion never addressed that issue. To the contrary, Judge Brown began his opinion by stating that "[t]he sole issue raised by the state in its appeal to this court is whether the trial court committed reversible error by excluding testimony on the subject of the 'battered wife syndrome'"¹⁸⁹ Further, since only two judges concurred in the opinion,¹⁹⁰ its authoritative weight is questionable. Also, Judge Brown used the phrase "is inadmissible herein,"¹⁹¹ which may indicate that given a different case, the court might hold otherwise. In her dissent from the court of appeals decision, Judge Krupansky suggested a similar notion: "[T]his court must not be blinded by the rhetoric no matter how righteous the cause may be. Nor may we use *an inappropriate case* as a springboard to break new ground in undeveloped areas of the law in order to be part of the avant garde."¹⁹² Thus, trial judges

183. *Id.*

184. *Id.*

185. *Id.* at 894.

186. *State v. Thomas*, 17 Ohio Op. 3d 397, 403 (Ct. App. 1980), *rev'd*, 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981).

187. See *supra* text accompanying notes 82-83.

188. Brief for Appellant at 7.

189. 66 Ohio St. 2d 518, 520, 423 N.E.2d 137, 139 (1981).

190. The two concurring judges were W. Brown and Sweeney. *Id.* at 522, 423 N.E.2d at 140.

191. *Id.* at 521, 423 N.E.2d at 140 (emphasis added).

192. *State v. Thomas*, 17 Ohio Op. 3d 397, 408 (Ct. App. 1980) (Krupansky, J., dissenting), *rev'd*, 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981) (emphasis added).

who exclude similar testimony in the future cannot necessarily depend on the *Thomas* case to provide a safe harbor for their decisions.¹⁹³

And what of the trial judge who admits the testimony? Properly read, *Thomas* cannot be viewed as a limitation on the trial judge's latitude in admitting this type of evidence. It is well established under Ohio case law that the trial judge has wide discretion in admitting expert testimony.¹⁹⁴ Likewise, the United States Supreme Court has held that a judge's decision to admit evidence should not be set aside "unless manifestly erroneous."¹⁹⁵ Thus, it should not be inferred from *Thomas* that a trial judge who admits expert testimony regarding battered women has committed a reversible error. The court's conclusion was that the exclusion of the testimony did not constitute an error. Any extension of this conclusion would undermine the discretion traditionally exercised by trial courts.

V. CONCLUSION

The Ohio Supreme Court's cursory treatment of *Thomas* indicates its distaste in general for the battered woman defense. If the court was determined to hold against the defendant, it could have done so by finding that the trial judge had not abused his discretion by finding the testimony unhelpful to the jury. Instead, it chose to wage a superficial attack on the admissibility of expert testimony on battered women. In doing so, the court not only went beyond the question before it on appeal, but also incorrectly applied Ohio evidence law, creating confusion for trial courts that will face this issue in the future. The ambiguity of *Thomas* will undoubtedly cause anxiety for trial judges who must rule on the admissibility of this testimony. But while the decision temporarily creates a safe harbor for judges choosing to exclude the testimony under similar circumstances, it should not be seen as an obstacle to the perceptive trial judge who, within his or her discretion, finds the evidence admissible.

M. Katherine Jenson

193. In her dissent from the court of appeals decision, Judge Krupansky listed the following eight reasons why the exclusion of the testimony was not an error:

- (1) There was no proper proffer of expert testimony;
- (2) Appellant's [defendant's] expert had no personal contact with appellant;
- (3) No hypothetical question was propounded to appellant's expert witness;
- (4) There was no determination that appellant was, in fact, a battered woman;
- (5) Analysis of the issues raised was within the realm of the jury;
- (6) The trial court's jury charge more than adequately covered the situation;
- (7) There was no prejudice to appellant;
- (8) The trial court did not abuse its discretion.

Id. at 409. Judge Brown referred with approval to these eight reasons. 66 Ohio St. 2d 518, 520, 423 N.E.2d 137, 139 (1981). Of the eight the first four do not present significant obstacles to future defendants. Under Ohio's rules of evidence, hypothetical question use is now optional. OHIO R. EVID. 705 staff note. The remainder of these four can be avoided by counsel. By removing these four barriers, future defense counsel may be able to overcome the protective shield that *Thomas* placed around the trial judge who excludes expert testimony concerning battered women.

194. *State v. Auerbach*, 108 Ohio St. 96, 140 N.E. 507 (1923); *Wabash R.R. v. City of Defiance*, 52 Ohio St. 262, 40 N.E. 89 (1895), *aff'd*, 167 U.S. 88 (1897); *Yoder v. Bernier*, 40 Ohio App. 2d 369, 361 N.E.2d 490 (Ct. App. 1976); *Gano v. Cleveland, Cin., Chi. & St. L. Ry.*, 33 Ohio App. 142, 168 N.E. 566 (Ct. App. 1929); *Cincinnati St. Ry. v. Hickey*, 29 Ohio App. 399, 163 N.E. 310 (Ct. App. 1928).

195. *Salem v. U.S. Lines Co.*, 370 U.S. 31, 35 (1962).

